No. 84-68

In The

Supreme Court of the United States

October Term, 1984

KERR-McGEE CORPORATION,

Petitioner,

v.

THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE TEXACO, INC.

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INTEREST OF AMICUS CURIAE

Texaco, Inc., produces oil and gas from a portion of the Navajo Indian Reservation located in the State of Utah. Texaco has 43 oil and gas leases authorizing it to produce oil and gas on the Navajo Reservation. These leases were entered into between the Navajo Tribe and Texaco, Inc., and were expressly approved by the United States Department of the Interior. Texaco, Inc. has invested over $42,000,000 on the acquisition and development of these leaseholds.

In 1978, the Navajo tribal council adopted a business activity tax and a possessory interest tax. Both of these taxes purport to empower the Navajo tax commission to impose substantial penalties on Texaco in the event the Navajo tax commission determines that Texaco has not fully complied with the provisions of these tribal tax ordinances. Among the penalties are included the right to "attach and seize assets of the taxable person," and to terminate all their "rights to engage in productive activity within the Navajo Nation" (Navajo Tribal Code, Title 24, §§ 212, 418). Although Texaco's leases were initially approved, and have since been extensively regulated, by the Interior Department, it has refused to supervise, or even review, Navajo taxation of non-Indian mineral lessees.

In addition to its leases on the Navajo Reservation, Texaco and its subsidiaries have mineral leases, also approved by the Department of the Interior, with other Indian tribes. Some of these Indian tribes are considering, or are in the process of imposing, taxes on the productive activities of Texaco and its subsidiaries. If these tribal taxes, like the Navajo business activity and possessory interest taxes, are imposed without review and supervision

by the Secretary of the Interior, Texaco is fearful that it may be deprived of its constitutional and property rights.

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SUMMARY OF ARGUMENT

The federal government has plenary authority over tribal lands and resources. Congress has delegated its authority to control the development of tribal property to the Secretary of the Interior. The Secretary of the Interior has a duty to review tribal resolutions which affect tribal resources and federal leases thereof. The Secretary of the Interior also has a duty to protect the Constitutional rights of non-Indians doing business on the reservation under federal authority. Tribal taxation of federal lessees is inconsistent with the status of Indian Tribes as domestic dependent sovereigns and ineffective without Secretarial approval.

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ARGUMENT

Introduction

At least fifteen types of valuable minerals, including oil, gas, helium, coal, shale, uranium and zinc are known to exist in significant quantities on Indian reservations.[1] In 1975, the United States Government estimated that 33 Indian reservations contained between 100 and 200 billion tons of coal, which would constitute 7-13% of the nation's total identifiable reserves.[2] At that time Indian-held resources also accounted for over 15% of the total of all

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[1]Bennett, *Problems and Prospects in Developing Indian Communities,* 10 Ariz. L.R. 649, 660 (1968).

[2]Comptroller General's Report to the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d Sess., Management of Indian Natural Resources, Pt. 2, pp. 77-8 (Comm. Print. 1976).

mining on Federal lands. The Department of the Interior has estimated that the oil and gas reserves of 40 Indian Reservations amount to 4.2 billion barrels of oil and 17.5 trillion cubic feet of gas.[3] Indian oil and gas leases were estimated in 1974 to cover a collective acreage of 4,187,644, and produce at least 30,685,000 barrels of oil and 125,080,000 mcfs of gas annually.[4] Such leases are increasing and the Navajo Tribe possesses abundant quantites of several of these strategic natural resources.[5]

In light of their belief that they were not being adequately compensated under the mineral leases approved by the Interior Department, the Navajo Tribe adopted a business activity tax and a possessory interest tax in 1978.[6]

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[3]*Id.*

[4]Bureau of Competition, Report to the Federal Trade Commission on Mineral Leasing on Indian Lands, 11, 17, 47 (October, 1975).

[5]*Ibid.* at 10.

[6]Two members of the Navajo Tax Commission admitted that these taxes were designed to produce added income from what the Tribe perceived as "the existing inequitable lease arrangements." After so describing the goal of the Navajo possessory interest tax, the Navajo tax commissioners stated:

> If lessees, faced with the prospect of a sizeable possessory interest tax, find it in their interest to renegotiate their existing leases, the tribal government is willing to do so, but until such time as the new lease is agreed upon, there should be a flow of additional revenues from the tax. *Ibid.* at p. 15.

(Williams and Cole, "Resource Revenue and Rights Reclamation: A Tax and Sulphur Emissions Program of the Navajo Nation," p. 3, March, 1978.)

The business activity tax is to be applied at a rate not less than 4% nor greater than 8%. § 401(b).[7] The initial rate for the business activity tax was set at 5%. *Id.* It purports to apply to every sale, whether "within or without the Navajo Nation of Navajo goods or services". § 403(2) This tax was submitted to the Secretary of the Interior for approval, but he refused to pass upon the validity of the tax.

The possessory interest tax, adopted by the Navajo Tribal Council in January, 1978, would require any person having ownership rights in any lease granted by the Tribe to pay an annual tax on the value of the leasehold interest at a rate of between 1% and 10% of its value as assessed by the tribal tax commission. § 201 This rate, like that of the business tax, is subject to change by the Navajo tax commission. §§ 201, 401

Under the Navajo possessory interest tax, a taxpayer may be subjected to having "all rights to engage in productive activity within the Navajo Nation suspended by the [Navajo tax] commission and shall be subject to permanent loss of all rights to engage in productive activity with the Navajo Nation". § 214 It also allows the Navajo tax commission "to attach and seize assets of a taxable person." § 212 In addition to allowing the tribe to seize Texaco's assets and suspend its right to engage in business, the possessory interest tax allows the tribe to assess substantial penalties. It provides a penalty of up to one-half of one percent of the total value of the taxpayer's possessory interest, as assessed by the Tribe, for any taxpayer failing timely to file a declaration of taxable interest. § 215 Another two-tenths of one percent of the value of the taxpayer's possessory interest may be assessed as a penalty by the commission for each month's delay in filing a tax declaration. (*Ibid.*)

[7]All references to the specific sections of the business activity tax and the possessory interest tax are to the Navajo Tribal Code, Title 24 (1979 Supp.).

The Navajo business activity tax also gives the Navajo tax commission the power to seize the taxpayer's assets and to terminate all the taxpayer's "rights to engage in productive activity within the Navajo Nation . . ." § 418 Additionally, the business activity tax provides that "[a] person required to provide information necessary or helpful for the assessment or collection of a tax who fails to do so may be fined up to $5000 for each offense and may have all rights to engage in productive activity within the Navajo Nation suspended." § 421

Both the Navajo taxes also contain provisions providing penalties for any taxpayer who attempts to "defeat the tax". § 217

I.

The Secretary of the Interior has a duty to review and supervise tribal action which has an impact upon Indian resources and federal licensees.

A. The federal government has plenary authority over tribal lands and resources.

While the United States Constitution does not recognize Indian tribes as sovereign governmental entities, it does invest the Congress with the power to regulate and supervise Indian tribes and their activities, particularly with non-Indians.[8] From its earliest days, Congress interpreted this Constitutional authority over Indian affairs

[8]While the Constitution only grants federal authority over "Indian tribes" specifically in relation to control over the regulation of commerce, Article I, § 8, Clause 3, plenary federal power over tribal activities and relations with non-Indians was

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broadly. As early as 1790, Congress voided sales of land by "any Indians, or any nation or tribe of Indians" without the consent of the United States.[9] Other early enactments by Congress controlled travel[10] and settlement[11] and every aspect of trade with Indians[12] by non-Indians in Indian territory.

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recognized as having roots in other constitutional provisions at an early date. In *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832), Chief Justice John Marshall made reference to several Constitutional provisions in concluding Congress was vested with broad authority over Indian affairs, saying:

> "That instrument [the Constitution] confers on congress the powers of war and peace; of making treaties and of regulating commerce with foreign nations and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions." 31 U.S. (6 Pet.) at 559.

In his concurrence in *Worcester,* Justice McClean relied more upon the Property Clause (Article IV, § 3, Cl. 2) to authorize federal control over tribal reservations. *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543, 587-8 (1823), *Oklahoma v. Atchison, T. & S.F. Ry,* 220 U.S. 227, 285 (1911) and *Hallowell v. United States,* 221 U.S. 317, 324 (1911), also trace Congressional power over Indian reservations to the Property Clause. This Court has also found other Constitutional sources authorizing Congressional legislation relating to other specific Indian problems. *Morton v. Ruiz,* 415 U.S. 199 (1974) (Article I § 8 Cl. 1); *Ex parte Webb,* 225 U.S. 663 (1912) (Article IV § 3 Cl. 1); *United States v. Navarre,* 173 U.S. 77 (1899) (Article III § 1)

[9]Trade and Intercourse Act of July 22, 1790, Ch. 33, 1 Stat. 137, currently codified as 25 U.S.C. § 177 (1976). This Act continues to invalidate tribal attempts to transfer land without federal approval. *Oneida Indian Nation v. County of Oneida,* 719 F.2d 525 (2d Cir. 1983).

[10]Trade and Intercourse Act of 1876, Ch. 30, § 3, 1 Stat. 469, 470.

[11]Trade and Intercourse Act of March 3, 1799, Ch. 46, § 4, 1 Stat. 743.

[12]Act of April 18, 1796, Ch. 13, § 4, 1 Stat. 452, 453; Trade and Intercourse Act of 1834, Ch. 161, § 3, 4 Stat. 729 (Current-

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Since the adoption of the Constitution, "the commonly shared presumption of Congress,[13] the executive branch,[14] and lower federal courts"[15] (*Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 206 (1978)) has been that the federal government has virtually plenary power over Indian tribes, their land, and the resources thereof. This Court has also long recognized pervasive federal authority over Indian lands[16] and the activities thereon.[17]

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ly 25 U.S.C. § 263). Contemporary writers also recognized that Congress must have the power to regulate commerce between Indians and non-Indians so that the federal government could prevent disputes between the two groups. *See, e.g., The Federalist No. 3* at 16-17 (Wesleyan U.Ed. 1961).

[13]*See e.g.,* 25 U.S.C. § 564; 25 U.S.C. § 903(a); 25 U.S.C. § 121-125; 25 U.S.C. § 311-328.

[14]*Regulation of Traders on the Navajo Reservation,* 60 I.D. 176 (1948); *Jurisdiction of Courts of the Choctaw Nation,* 7 Op. Atty.Gen. 174 (1855); Testimony of Carol E. Denkins, Assistant Attorney General, Department of Justice, on Ancient Indian Land Claims: Hearings before the Select Committee on Indian Affairs, 97st Cong., 2d Sess. 37 (1982).

[15]*Jicarilla Apache Tribe v. United States,* 601 F.2d 1116 (10th Cir. 1979), *cert. denied,* 444 U.S. 995 (1979); *Menominee Tribe of Indians v. United States,* 607 F.2d 1335 (Ct. Cl. 1979), *cert. denied,* 445 U.S. 950 (1980); *Klamath & Modoc Tribes v. United States,* 436 F.2d 1008 (Ct. Cl. 1971), *cert. denied,* 404 U.S. 950 (1971); *Creek Nation v. United States,* 97 Ct. Cl. 591 (1942), *aff'd,* 318 U.S. 629 (1943); *United States v. Nelson,* 29 F. 202 (D. Alas. 1886), *aff'd,* 30 F. 112 (Or. Cir. 1887).

[16]*United States v. Sioux Nation,* 448 U.S. 371 (1980); *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272 (1955), *reh. denied,* 348 U.S. 965 (1955); *United States v. Alcea Band of Tillamooks,* 341 U.S. 48 (1951); *Rosebud Sioux Tribe v. Kniep,* 430 U.S. 584 (1977); *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649 (1976); *Shoshone Tribe of Indians v. United States,* 299 U.S. 476 (1937); *Nadeau v. Union Pacific R.R. Co.,* 253 U.S. 442 (1920); *United States v. Bd of County Commr's Osage County,* 251 U.S. 128 (1919); *Marchie Tiger v. Western Investment Co.,* 221 U.S. 286 (1911); *Blackfeather v. United States,* 190 U.S. 368 (1903); *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903); *Cherokee Nation v. Hitchcock,* 187 U.S. 294 (1902).

[17]*United States v. Antelope,* 430 U.S. 641 (1977); *Hynes v. Grimes Packing Co.,* 337 U.S. 86 (1949); *United States v. Nice,*

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B. The Secretary of the Interior has a duty to review Tribal resolutions which affect Tribal resources and federal leases thereof.

The federal government has a property interest in Indian lands and the Secretary of the Interior has a duty to manage those lands not only for benefit of the Indians but also the public at large.[18] Under federal law the Secretary of the Interior has a general duty to "make the tribal property productive"[19] and therefore to supervise every aspect vital to the development of tribal resources.[20] In *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983) this Court recognized, "Federal law commits to the Secretary and the tribal council the responsibility to manage the reservation's resources." Although the resource involved in the *Mescalero* case was game rather than oil, this Court found: "Federal law requires the Secretary to

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241 U.S. 591 (1916); *United States v. Waller,* 243 U.S. 452 (1917); *Cherokee Nation v. Southern Kansas Railway Co.,* 135 U.S. 641 (1890); *Stevens v. Cherokee Nation,* 174 U.S. 445, 478 (1899); *United States v. 43 Gallons of Whiskey,* 93 U.S. 188 (1876).

[18]*Tee-Hit-Ton Indians v. United States, supra; Starr v. Long Jim,* 227 U.S. 613, 625 (1913); *Cherokee Nation v. Hitchcock,* 187 U.S. 294 (1902); *United States v. Rodgers,* 45 U.S. (4 How.) 567 (1846); *State of California by and through Brown v. Watt,* 668 F.2d 1290 (D.C. Cir. 1981); *Badoni v. Higginson,* 638 F.2d 172 (10th Cir. 1980), *cert. denied,* 452 U.S. 954 (1981); *see also* 43 U.S.C. § 1457.

[19]*Cherokee Nation v. Hitchcock,* 187 U.S. 294 at 307 (1902).

[20]*United States v. Mitchell (Mitchell II),* 102 S. Ct. 2961, 77 L.Ed.2d 580 (1983); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980); *People v. McCovey,* 205 Cal. Rptr. 643, 685 P.2d 687 (1984).

review each of the tribe's hunting and fishing ordinances." 462 U.S. at 615. Tribal action impacting the development of tribal property or resources therefor requires Secretarial approval and implementation.[21]

The necessity for Secretarial involvement in tribal taxes on the value of, and the business generated from, oil and gas leases specifically authorized by the Interior Department is even more clear. The courts have recognized that the Secretary has a duty to comprehensively regulate mineral production on Indian leases for the benefit of both the public and Indian tribes.[22] The Interior Department has therefore traditionally been integrally involved in every aspect of oil and gas development on Indian reservations.[23] Moreover, Section 396(d) of the Indian Mineral Leasing Act[24] makes it clear Congress intends the Secretary to directly regulate "all operations under oil or gas, or other such mineral lease issued pursuant to the terms" of the Act. The Secretary of the Interior has recognized his obligations to implement the In-

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[21]25 U.S.C. §§ 81, 415, 121-125, 311-321 (1976); *Jurisdiction of Courts of the Choctaw Nation,* 7 Op.Atty. Gen. 174 (1855); *Right of the Cherokees to Impose Taxes on Traders,* 1 Op.Atty. Gen. 645 (1824); *Memorandum of the Solicitor to the Commissioner of Indian Affairs* (June 3, 1941).

[22]*United States v. Mitchell, supra; Kenai Oil & Gas, Inc. v. Dept. of the Interior,* 671 F.2d 383, 387 (10th Cir. 1982); *Navajo Tribe of Indians v. United States,* 624 F.2d 981, 987 (Ct. Cl. 1980); *Hoover & Bracken Energies v. United States Dept. of Interior,* 723 F.2d 1488 (10th Cir. 1983), *cert. denied.* 83 L.Ed.2d 39 1984).

[23]*Boesche v. Udall,* 373 U.S. 472 (1963); *Cherokee Nation v. Hitchcock, supra; Taylor v. Tayrien,* 51 F.2d 884 (10th Cir. 1931), *cert. denied,* 284 U.S. 672 (1931).

[24]25 U.S.C. §§ 396a-396g (1976).

dian Mineral Leasing Act and has promulgated regulations governing virtually every aspect of the operation of such leases.[25]

It is clear that the imposition of the possessory interest tax and the business activity tax by the Navajo tribal council will have a direct impact upon not only the energy companies and non-Indian public, but upon the Tribe itself. Since the Secretary of the Interior has a duty to supervise and manage tribal assets, unilateral tribal action which will affect, and potentially inhibit development of these assets cannot be allowed.[26] If the Tribe increases the level of these taxes without participation by the federal government, it is clear that in the long term tribal resources may not be developed in the best interest of the tribe or the nation. Tribal actions which so clearly impact the development of tribal and national resources, therefore, cannot be implemented without the participation and concurrence of the Secretary of the Interior.

When the Secretary of the Interior has the duty to monitor and regulate Indian activities he cannot simply decide not to become involved.[27] He cannot, therefore, ful-

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[25]25 CFR § 211 and 30 CFR § 206; Interior Department Notices to Lessees, 1-7; *Mineral Management Services Payor Handbook; United States Geological Service Conservation Manual*, Part 647, Chapters 2 and 15.

[26]*Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir. 1983), *cert. denied*, 78 L.Ed.2d 723 (1983); *U.S. v. 9,345.53 acres*, 256 F. Supp. 603, 605 (W.D.N.Y. 1966). *Cf. Kennerly v. District Court*, 400 U.S. 423 (1971), (unilateral transfer of tribal jurisdiction ineffectual in the absence of federal authorization or participation).

[27]*Rockbridge v. Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971); *United States v. Douglas*, 190 F. 482 (8th Cir. 1911); *United States v. Gray*, 201 F. 291 (8th Cir. 1912); *United States v. Sandstrom*, 22 F. Supp. 190 (N.D. Okla. 1938).

fill his statutory duty to supervise tribal resource development by merely delegating his authority to the Navajo tribal council, without any procedure for review by federal authorities.[28]

C. The Secretary of the Interior has the legal authority to control development of tribal property and resources.

Over the years, Congress has delegated much of its authority to regulate and control Indian property, resources and activities to the Interior Department.[29] Congress has, for example, required the Secretary of the Interior to approve both land sales and long-term leases by Indian tribes.[30] Secretarial approval is even required before a tribe may grant a right-of-way across its land.[31] Secretarial approval is also required for the sale or lease of natural resources produced on tribal lands.[32] The Secretary is also required to approve contracts obligating tribal funds.[33]

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[28]*Oglala Sioux Tribe v. Hallett*, 708 F.2d 326 (8th Cir. 1983); *New York Indians v. United States*, 40 Ct. Cl. 448 (1905); *United States v. Camp*, 169 F. Supp. 568 (E.D. Wash. 1959).

[29]*See, e.g.*, Act of July 27, 1868, Ch. 259, 15 Stat. 228; Act of Aug. 15, 1876, Ch. 289, § 5, 19 Stat. 176, 200 (codified presently at 25 U.S.C. § 261); *United States v. John*, 437 U.S. 634 (1978); *Brader v. James*, 246 U.S. 88 (1918); *Secretary's Power to Regulate Conduct of Indians*, I Int.Op.Sol. 531 (1935). In *Moapa Band of Paiute Indians v. U.S. Dept. of Int.*, No. 84-1593 (9th Cir.), the Interior Department refused to approve a tribal ordinance allowing the tribe to operate a brothel on the reservation.

[30]25 U.S.C. § 177, 399, 397, 402(a), 415 (1976).

[31]25 U.S.C. § 311, 312, 319, 321, 323 (1976).

[32]25 U.S.C. 396a, 397, 399, 406, 407 (1976).

[33]25 U.S.C. § 81, 85, 121-125 (1976).

In addition to delegations of authority to control specific matters, the Secretary has broad authority under 25 U.S.C. §§ 2 and 9 to govern Indian affairs in general.[34] In *Udall v. Littell,* 366 F.2d 668 (D.C. Cir. 1966), *cert. denied* 385 U.S. 1007 (1967), *reh. denied* 386 U.S. 939 (1967), the Court relied in part on 25 U.S.C. § 2, which it found "delegates to the Secretary the supervision of the affairs and public businesses of the Indian tribes." 366 F.2d at 672. Speaking for a unanimous Court, Judge, now Chief Justice, Burger, defined the power of the Secretary over Indian business and contractual relationships in the following terms:

> "In charging the Secretary with broad responsibility for the welfare of Indian tribes, Congress must be assumed to have given him reasonable powers to discharge it effectively. Courts have taken this approach with respect to various aspects of Indian life, recognizing that '[t]his statute furnishes broad authority for the supervision and management of Indian affairs and property commensurate with the obligation of the United States.'" 366 F.2d at 673.

In its treatise, *Federal Indian Law* (U.S.G.P.O. 1958), the Interior Department itself reviewed its broad statutory authority under 25 U.S.C. §§ 2 and 9 and concluded:

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[34]*United States v. Birdsall,* 233 U.S. 223 (1914); *State of New Mexico v. Aamodt,* 537 F.2d 1102 (10th Cir. 1976), *cert. denied,* 429 U.S. 1121 (1977); *Armstrong v. United States,* 306 F.2d 520 (10th Cir. 1962); *United States v. Barnsdall Oil Co.,* 127 F.2d 1019 (10th Cir. 1942); *United States v. Stanolin Crude Oil Purchasing Co.,* 113 F.2d 194 (10th Cir. 1940); *Rainbow v. Young,* 161 F. 835 (8th Cir. 1908); *United States v. Clapox,* 35 F. 575 (D. Or. 1888); *People v. McCovey,* 205 Cal. Rptr. 643, 685 P.2d 687 (1984).

> "Federal administrative power over Indian affairs, vested in the Secretary of the Interior, is virtually all-inclusive." (Pp. 51-52.)[35]

It is clear then, the Secretary of the Interior has the legal authority to review the proposed Navajo taxes. He also has a duty to do so.

II.

The Secretary of the Interior has a duty to protect the Constitutional rights of non-Indians doing business on the reservation under federal authority.

Even if the Secretary of the Interior did not have a duty to supervise and control the development of tribal property and resources, he would be obligated to review the Navajo possessory interest and business activity taxes before they could be imposed on non-Indian federal lessees.

Indian tribes are not constrained by the United States Constitution in the same fashion or to the same extent as the federal and state governments.[36] The Secretary of the Interior is, of course, bound to uphold the Constitutional rights of all Americans.[37] While Indian tribes, then, may

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[35]The Deputy Solicitor of the Interior Department specifically represented to this Court that 25 U.S.C. §§ 2 and 9 provide a basis for Interior to "disapprove and certainly to refuse to implement any ordinance enacted by a tribe which bears on others than members, and which has not been approved and would affirmatively disapprove . . ." (Oral Argument in *Merrion v. Jicarilla Apache Tribe,* No. 80-11, Nov. 4, 1984, Tr. p. 43 [455 U.S. 130 (1982)]. For an excellent review of the Interior Department's recent interpretation of its broad statutory mandate to govern all aspects of Indian affairs, see *Treaty Status of the Muckleshoot Indian Tribe,* 80 I.D. 222, 225-227 (1972).

[36]*Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978); *Talton v. Mayes,* 163 U.S. 376 (1896); *Toledo v. Pueblo de Jemez,* 119 F. Supp. 429 (D.N.M. 154).

[37]*Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952); *Ballinger v. United States, ex rel. Frost,* 216 U.S. 240 (1910).

arguably be able to govern non-Indians absent the limitations on governmental power delineated in the Constitution, that venerable document does not contemplate enclaves where the Constitutional rights of Americans may be suspended.[38] As the Court recognized in *Merrion,* it is important that the Interior Department be involved in the review and administration of Indian tribal taxes over non-Indians. Based on their ethnicity, non-Indians do not have the right to vote in tribal elections or participate in tribal government in any fashion. Taxation against a non-resident is always dangerous[39] but it is particularly dangerous in this situation, where the non-Indians have no means of acquiring "residency" or the right to participate in tribal government.[40] It is, therefore, imperative that the Interior Department intervene to insure that any taxes imposed by the tribal council are not arbitrary and comply with both the national and tribal interest.

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[38]*Southern R. Co. v. Greene,* 216 U.S. 400, 412 (1910); 258 U.S. 298, 309 (1922); *Healy v. James,* 408 U.S. 169, 180 (1972). Tribal customs are clearly not an appropriate basis on which to allow non-Indians to be governed in contravention of their Constitutional rights, by Indian tribes. *In re Sah Quah,* 31 F. 327 (D. Alas. 1886).

[39]As Justice Jackson said in *Independent Warehouses v. Scheele,* 331 U.S. 70 (1947) (dissenting):

> "But here the ultimate burden of the tax falls on consumers of New York and elsewhere who have no representation in the government which lays the tax and fixes its amount. The authorities who have fixed the tax will never have to answer to those who pay it. That is the evil of 'taxation without representation' . . . it is a tax that falls ultimately on non-residents of the taxing authority. If it is valid, I know of no reason why the community should bear any of its own tax burdens." 331 U.S. at 94-95.

[40]"In this nation each sovereign governs only with the consent of the governed." *Nevada v. Hall,* 440 U.S. 410, 426 *reh. denied* 441 U.S. 917 (1979).

In *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982), this Court specifically found that Secretarial approval of tribal taxation imposed on non-Indians was necessary, in part to prevent the unfair or arbitrary use of tribal authority. Although this Court approved the severance tax of the Jicarilla Apache Tribe in *Merrion,* it pointed out repeatedly that since the Jicarillas had accepted the Indian Reorganization Act, 25 U.S.C. § 476,[41] both their Constitution and the tribal tax at issue had been specifically reviewed and approved by the Interior Department. More importantly, this Court emphasized the necessity of Secretarial approval as a safeguard for the constitutional rights of non-Indians subjected to tribal authority. Speaking for the majority, Justice Marshall pointed out that under the Indian Reorganization Act, "Congress has affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect." 455 U.S. at 155. After noting the limitations inherent in tribal sovereignty (see Point III, *infra*), Justice Marshall made the following relevant observations:

> "Of course, the tribe's authority to tax non-members is subject to constraints not imposed on other governmental entities: the federal government can take away this power, and the tribe must obtain the approval of the Secretary before any tax on non-members can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and insure that any exercise of the tribal

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[41]For a detailed discussion of the failure of the Navajo tribe to accept the Congressional authorization for tribal governmental authority contained in the Indian Reorganization Act, see the brief of the petitioner, Kerr-McGee, pp. 27-30.

power to tax will be consistent with national policies." 455 U.S. at 141.[42]

It is particularly important that the Secretary review and participate in the administration of the Navajo taxes at issue, since they contain several features which have the potential to be exercised "in an unfair or unprincipled manner", "[in]consistent with national policies." The Navajo taxes, for example, have substantial potential to deprive petitioners of their right to a hearing before an impartial tribunal and thus, of due process of law.

The Navajo tribal taxes provide that the courts of the Navajo tribe are vested with exclusive jurisdiction over any and all persons subject to the tax. §§ 219, 425. Both taxes contain provisions specifically prohibiting any suit to restrain the assessment or collection of the taxes "in any court by any person" and for penalties for taxpayers who "evade or defeat the tax." §§ 217, 222, 426.

Unlike the Jicarilla tax approved in *Merrion* which specifically provided for review in federal court, neither of the Navajo taxes allow for any review of non-Indians' constitutional claims by a court sanctioned under Article III of the United States Constitution.[43] Texaco submits

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[42]Although the Navajos have previously argued the Court did not rely on Secretarial approval of the tribal tax in *Merrion*, their argument is not consistent with the language of the opinion, (see, e.g., 455 U.S. 151, n. 16) or its subsequent interpretations by legal commentators. *Note Indian Taxation of Non-Indians*, 50 Tenn.L.R. 403 (1983); Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, 132 U.Pa.L.R. 195, 234, n. 216 (1984).

[43]It is especially important that the non-Indian petitioners herein have access to an Article III court, since the Navajo tribal courts are obligated to resolve disputes under the "Customs and

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that it is not appropriate to subject non-Indians to judgment "not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception." *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883).[44] The Secretary, therefore, has an obligation to make sure non-Indians doing business on Indian reservations have access to a fair hearing before an impartial tribunal with review by a court sanctioned under Article III.[45] This is especially true here, since the Secretary of the Interior had expressly rejected separate Navajo courts not subject to Interior Department review at the time several of these mineral leases were executed.[46]

The provisions of the Navajo taxes which provide for final review by the Navajo supreme judicial council are

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Usages" of the Navajo tribe. N.T.C., T 7, § 204. Indeed, the Navajo Supreme Judicial Council has a panel "composed of persons learned in Navajo law, custom, tradition and culture, including medicine men, retired judges, chapter officers, anthropologists, advocates, professors and other professionals" to sit on each case and advise it. N.T.C., T 7, § 326.

[44]*Compare United States v. Wheeler*, 435 U.S. 313, 331-2 (1978) (recognizing such informal tribal custom is appropriate to judge tribal members) with *Oliphant v. Suquamish Indian tribe, supra* (1978) (rejecting Indian criminal jurisdiction over non-members).

[45]The "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). For that reason, the Constitution mandates that any challenge to the deprivation of a constitutionally guaranted right be reviewable in an Article III Court. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977); *Petersen v. Clark*, 285 F. Supp. 700 (N.D. Cal. 1968).

[46]*See* preamble to CO-69-58 History, N.T.C. Title 7 § 201.

also troubling since the Navajo tribal council which adopted these taxes becomes the final arbiter of their legality and applicability.[47] The Navajo supreme judicial council consists of eight members, five of whom are members of the current tribal council, with provision for the appointment of two former members of the tribal council. N.T.C. Title 7, § 322. All members of the supreme judicial council are appointed by the chairman of the tribal council. *Id.* When a legislative body such as the Navajo tribal council initiates governmental action and then acts as the final arbitrater thereof, the guarantee of due process of law is in danger.[48]

The Secretary's role as an arbiter of disputes between Indian and non-Indians, then, is particularly critical in the present situation. In *Oliphant v. Suquamish Indian Tribe, supra,* this Court found that whatever original judicial authority Indian tribes had over non-Indians operating on the reservation had been relinquished to the federal government. Speaking for the Court, Justice Rehnquist said:

> "But from the formation of the Union and the adoption of the Bill of Rights, the United States has now vested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States, except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a want of fixed laws [and] of competent tribunals of justice. H.R. Regs. No. 474, 23d Cong., 1st Sess. 18 (1834). It should be no less obvious today, even though present day Indian tribal courts embody dramatic advances over their historical antecedents. . . . These considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondent's contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedure." 435 U.S. at 210-211.

The enforcement provisions of the Navajo taxes could subject the non-Indian federal lessees to seizure of all their reservation property, permanent suspension of the right to do business "within the Navajo Nation" and thousands of dollars in penalties.[49] These sanctions are essentially punitive and quasi-criminal in character.[50] The Secretary, therefore, must uphold the federal interest in protecting these non-Indian federal lessees against the

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[47]After the Navajo court of appeals declared several tribal council resolutions invalid, the tribal council passed a resolution creating the Navajo "Supreme Judicial Council" to have final authority over all judicial proceedings. N.T.C. Title 7, § 321.

[48]The danger for abuse when the legislature reviews and passes upon the legality of its own pronouncements led to the prohibition of Bills of Attainder in our Constitution. *United States v. Brown,* 381 U.S. 437 (1965); *People v. Budd,* 117 N.Y. 1, 22 N.E. 670 (1889), *aff'd* 143 U.S. 517 (1892).

[49]That the lessees legitimately fear such sanctions is evidenced by *Tenneco Oil Company v. Sac & Fox Tribe of Indians,* 725 F.2d 572, 574 (10th Cir. 1984), wherein the Tribe notified the lessee that "a petition for cancellation of Tenneco's lease had been submitted to the tribe's business committee based on Tenneco's failure to comply with the newly enacted tribal tax."

[50]*United States v. United States Coin & Currency,* 401 U.S. 715 (1971); *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 700 (1965).

quasi-criminal sanctions which may be unilaterally imposed by the tribe under the Navajo taxes.[51]

III.

Tribal taxation of federal lesees without secretarial approval is inconsistent with the status of Indian tribes as domestic dependent sovereigns.

Indian tribes have never been recognized as having the right to exercise coercive governmental power over non-Indians. *Oliphant v. Suquamish Indian Tribe, supra.* "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States,* 450 U.S. 544 (1981) *reh. denied,* 452 U.S. 911 (1981). The Navajo tribe, therefore, does not have the "inherent sovereign power" to impose these taxes without participation by the federal government.

As early as 1810 this Court recognized the limitations of tribal authority over non-Indians.[52] The limited nature of tribal sovereignty was first analyzed at length by Chief Justice John Marshall in *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831), where he described Indian tribes as "domestic dependent nations". In a concurring opinion, Justice Johnson made it clear that Indian tribes were not to be equated with the federal or state governments in

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[51]In the absence of direct federal involvement, such quasi-criminal sanctions as seizure of a non-Indian's property have historically been found to be outside the realm of tribal powers, in the absence of direct federal involvement. *Quechan Tribe v. Rowe,* 531 F.2d 408, 411 (9th Cir. 1976); *Settler v. Yakima Tribal Court,* 419 F.2d 486, 489 (9th Cir. 1969) *cert. denied* 398 U.S. 903 (1970); *Colliflower v. Garland,* 342 F.2d 369 (9th Cir. 1965).

[52]*Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810).

terms of their governmental authority, especially over non-Indians. 30 U.S. (5 Pet.) at 26. *See also* the concurrence of Justice Baldwin. 30 U.S. (5 Pet.) at 48-49.[53]

In *United States v. Kagama,* 118 U.S. 375 (1886), the Court interpreted an Act of Congress[54] prohibiting further treaties with Indian Tribes, as a recognition the Tribes did not possess sovereignty in the sense of independent governmental power, but were completely "dependent for their political rights" on the government of the United States. 118 U.S. at 384.

This Court's more recent decisions have likewise recognized that Indian tribes are proscribed from exercising those governmental powers terminated by Congress,[55] as well as those inconsistent with their dependent status.[56] In *United States v. Wheeler,* 435 U.S. 313 (1978), this Court recognized that Indian tribes do not possess governmental sovereignty in the same sense, or from the same source, as the United States government. In describing the areas of "sovereignty" necessarily withdrawn as a result of the dependent status of Indian tribes, Justice Stewart, speaking for a unanimous Court, said:

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[53]Other early decisions likewise recognized the limitations inherent in the fact tribal sovereignty is "dependent". *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543, 574 (1823); *United States v. Rodgers,* 45 U.S. (4 How.) 567 (1846); *United States v. McBratney,* 104 U.S. (14 Ott) 621 (1881); *Choctaw Nation v. United States.* 119 U.S. 1, 27 (1886).

[54]This statute, the Act of March 3, 1871, Ch. 120 § 3, 16 Stat. 570 is presently codified as 25 U.S.C. § 71.

[55]*Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977); *United States v. Quiver,* 241 U.S. 602 (1916).

[56]*Kennerly v. District Court,* 400 U.S. 423 (1971); *People v. Martin,* 326 U.S. 496 (1946).

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of a tribe. . . . These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. 435 U.S. at 326.

In light of this "implicit divestiture of sovereignty" over non-members of the tribe, tribal governmental action must be implemented by federal authority to be effective against non-Indians.[57] The Interior Solicitor has repeatedly held "That the taxing power of Indian tribes does not extend to the levy by a tribe of a tax upon licensed traders, in the absence of an authorization from the Commissioner of Indian Affairs." *Regulation of Traders on the Navajo Reservation*, 60 I.D. 176, 178 (1948). *See also Powers of Indian Tribes*, 55 I.D. 14, 48 (1934). Such opinions are consistent with other decisions by legal officers of the executive branch [58] as well as those of the lower courts.[59] This Court has also long recognized that in the absence

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[57]*United States v. Mazurie*, 419 U.S. 544, 547-8, 554 (1975); Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 Hastings L.J. 89, 135-6 (1978); Note, *Balancing the Interests in Taxation of Non-Indian Activities on Indian Lands*, 64 Iowa L.R. 1459, 1464 (1979); Oliver, *The Legal Status of American Indian Tribes*, 38 Or.L.R. 193, 230-4 (1959). *Cf.* 18 USC § 1165 (federal criminal penalties authorized to enforce tribal hunting and fishing ordinances.

[58]*See e.g., Right of the Cherokees to Impose Taxes on Traders*, 1 Op. Atty. Gen. 645 (1824); *Memorandum of the Solicitor to the Commissioner of Indian Affairs*, p. 2, June 3, 1941.

[59]*Muskogee National Telephone Co. v. Hall*, 118 Fd. 382 (8th Cir. 1902); *City of Tulsa v. Southwestern Bell Telephone*, 5 F. Supp. 822 (N.D. Okla. 1934), *aff'd* 75 F.2d 343 (10th Cir. 1935), *cert. denied* 295 U.S. 744 (1935).

of federal approval and implementation, tribal action cannot lawfully interfere with property rights sanctioned by the federal government.[60] Indeed, in every case where tribal taxation has been approved by the judiciary, it has been expressly sanctioned and/or implemented by the executive branch of the federal government.[61]

While Indian tribes retain the power to tax non-Indian lessees when such taxation is approved or implemented by the federal government,[62] then it is clear tribal taxation of federal lessees without federal approval is "inconsistent with their diminished status as sovereigns." *Montana v. United States, supra.* For this reason Congress adopted a specific framework for federal supervision over, and participation in, such tribal resolutions. Under the Indian Re-

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[60]*Cherokee Nation v. Southern Kansas Railway Co.*, 135 U. S. 641 (1890).

[61]*Merrion v. Jicarilla Apache Tribe, supra; Morris v. Hitchcock*, 194 U.S. 384 (1904) (tribal tax approved by the President of the United States.) In both *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) and *Barta v. Oglala Sioux Tribe*, 146 F. Supp. 917 (D.S.D. 1956), *aff'd* 259 F.2d 553 (8th Cir. 1958) *cert. denied* 358 U.S. 932 (1959), the authority of the tribe to levy taxes was approved and implemented through the procedure specifically required under the Indian Reorganization Act, 25 U.S.C. § 476 (1976). In rejecting the contention that since tribal power was an "inherent attribute of sovereignty," the collection of the tribal tax did not raise a federal question, the *Barta* Court said:

> "Thus the rights derived from original sovereignty have been directly channeled into a federal statutory scheme and all tribal powers are exercised under federal law. The plaintiff's tribal constitution was not adopted under rules established by tribal custom, but rather under authority granted by the Congress of the United States, namely, the Indian Reorganization Act." 146 F. Supp. at 918.

[62]*Merrion v. Jicarilla Apache Tribe, supra; Crabtree v. Madden*, 54 F. 426 (8th Cir. 1893); *Iron Crow v. Oglala Sioux Tribe, supra; Barta v. Oglala Sioux Tribe, supra.*

organizat[illegible]ct, 25 U.S.C. § 476, Congress established "a serie[illegible]ederal checkpoints"[63] for implementation of such ordinances. Despite repeated invitations by Congress to participate under the Indian Reorganization Act, the Navajos have declined to do so.[64]

The Navajos taxes at issue here are also beyond the authority of the Tribe because they purport to have extraterritorial effect. The Navajo Business Activity Tax is imposed upon receipts from any "Navajo branch" for "gross receipts of that branch from the sale, either within or without the Navajo nation . . ." § 403(2)

While the Navajo business activity tax does not contain a definition of "Navajo Nation," that phrase has been defined in other contexts to include tribal and allottee lands beyond the borders off the Navajo Reservation.[65] This Court has emphasized that there is a significant geographical component to tribal sovereignty,[66] which cannot be enlarged over non-Indians without express federal delegation.[67] The Navajos do not have the authority to

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[63]*Merrion v. Jicarilla Apache Tribe, supra,* 455 U.S. at 155.

[64]Since the Navajo tribe refused to channel its "retained sovereignty" through the federally prescribed channels, it was necessary for the Interior Department to create a Navajo tribal government out of whole cloth. *Navajo-Hopi Rehabilitation Act, Proposed Constitution for Navajo Tribe,* II Int.Sol.Op. 1641 (1954); Order 551, Fed.Reg. Oct. 30, 1958; Navajo Tribal Council Resolution, CJA-1-59.

[65]*See e.g.* 18 U.S.C. § 1151 and N.T.C. Title 7 § 134, as discussed in *General Motors Acceptance Corp. v. Chischilly,* 96 N.M. 113, 628 P.2d 683 (1981).

[66]*White Mountain Apache Tribe v. Bracker, supra.*

[67]*Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148-9 (1973); *General Motors Acceptance Corp. v. Chischilly, supra;* Cohen, *Handbook of Indian Law,* 148 fn. 236 (U.N.M. ed. 1971); *Indian Police,* 18 Op.Atty.Gen. 440 (1886).

exercise unilateral jurisdiction over property which is not owned by the tribe since it "bears no clear relationship to tribal self-government". *Montana v. United States, supra* at 564. The exercise of such extraterritorial jurisdiction would also raise due process questions.[68] That such extraterritorial taxing jurisdiction is beyond the scope of tribal sovereignty is emphasized by the fact the Secretary of the Interior has disapproved tribal taxation of resources in similar checkerboard situations.[69]

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CONCLUSION

For the reasons given above, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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[68]*Riverside and Dan River Cotton Mills v. Menefee,* 237 U. S. 189 (1915); *National Mutual Building & Loan Assoc. v. Brahan,* 193 U.S. 635 (1904). *See also* opinion of Marshall, J. (dissenting) in *Rosebud Sioux Tribe v. Kneip, supra.*

[69]*Crow Tribe of Indians v. State of Montana,* 469 F. Supp. 154 at 156 (D. Mont. 1979). To the extent the Navajo taxes apply to tribal fee or trust land the Secretary has recognized he may approve only such regulations "as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property." 25 C.F.R. § 1.4(b); *United States v. County of Humboldt,* 3 Ind.L.Rptr. 6482 (N.D. Cal. 1976).